Supreme Court of the United States

OCTOBER TERM, 1956

No. 445

LAKE TANKERS CORPORATION,
Petitioner,

against

LILLIAN M. HENN, Administratrix,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Question Presented

Respondent takes issue with the accuracy and propriety of the language of the question presented at page 2 of petitioner's brief. The District Court and the Circuit Court of Appeals found that the aggregate of the claims is *not* greater than the limitation funds, as petitioner states in the question.

The District Court said:

> "Each limitation fund is clearly in excess of the claims asserted against each vessel." Petition of Lake Tankers Corp., 137 Fed. Supp. 311, 313; R. 59.

The Court of Appeals also held:

> "Consequently there was not an insufficient fund in respect of petitioner's liability either as owner of the tug or as owner of the barge." Petition of Lake Tankers Corp., 232 F. 2d 573, 577; R. 61.

This important finding of both Lower Courts renders the question presented defective as without factual foundation.

Statement of Case

Respondent's claim arises from the death of her husband, Robert C. Henn, resulting from a collision of the petitioner's barge *LTC No. 38*, in tow of its tug *Eastern Cities*, on the early morning of July 10th, 1954 in the Hudson River, above Poughkeepsie, New York, with the pleasure yacht *Blackstone*, on which the deceased was a passenger. He was thirty-six years of age and left him surviving his wife, the claimant herein, of the age of thirty years and three daughters of ages 9, 5 and 3 years. His body was not recovered (R. 26, 28).

This sequence of legal proceedings followed the occurrence:

September 20th, 1954—Letters of Administration were issued to claimant by the Surrogate's Court, Dutchess County, N. Y. (R. 19-20).

September 22nd, 1954—She instituted suit, as such administratrix, against petitioner, as owner of tug *Eastern Cities* and barge *LTC No. 38* alleging negligence of the petitioner and its servants in charge of the operation of both the tug and barge. Clyde Roan, owner of the yacht *Blackstone*, was also named as a defendant, and damages were claimed against both defendants in the sum of $500,000 (R. 3).

October 6th, 1954—A limitation petition was filed in the Southern District by petitioner, alleging ownership of the tug *Eastern Cities* and the barge *LTC No. 38*, that it had used diligence to make both vessels seaworthy, that the loss of life and property damages resulting from the collision were not caused through any fault on its part, or the *Eastern Cities* or the *No. 38*. Its petition made no reference to the value of the barge *LTC No. 38*, but alleged

that the tug *Eastern Cities'* value did not exceed $110,000 and that the pending freight was $8,542.21, that petitioner believed that the entire aggregate value "of its interest in said *Eastern Cities*" did not exceed $118,542.21, for which it offered a stipulation for value in that amount, "said sum being not less than the aggregate value of petitioner's interest in said tug and her pending freight". It also alleged that there were no unsatisfied demands or liens "against the *Eastern Cities*, her engines, etc., or her pending freight". The petitioner prayed, among other things, for appraisement of its interest in the tug *Eastern Cities* and that its liability, if found, be limited to the value of its interest in said tug and her pending freight, that it be discharged from all liability upon the surrender of "such interest" and that the money surrendered be divided pro rata among such claimants as might duly prove their claims (R. 1-6).

October 8th, 1954—A restraining order, issued by Honorable ARCHIE O. DAWSON in the Southern District of New York, was based upon affidavits of appraisers "as to the value of the tug *Eastern Cities* and her pending freight" and a stipulation for value for the tug and freight, in the sum of $118,542.21 (R. 10). It enjoined the prosecution of all suits "against petitioner herein and/or against the tug *Eastern Cities*" (R. 11).

November 8th, 1954—This respondent appeared specially and filed exceptions to the petition on the ground that the petitioner sought limitation and exoneration with respect to the barge *LTC No. 38* but failed to surrender that vessel and, therefore, such exemption could not be claimed in this proceeding. The application was for an order sustaining the exceptions and for a final decree dismissing the petition and vacating the injunctive order of October 8th, 1954 (R. 12-21).

December 16th, 1954—Honorable SYLVESTER J. RYAN denied the motion but held that the petitioner's failure to

file an additional bond on behalf of the barge *LTC No. 38* would require modification of the restraining order so that it would have effect only with respect to the tug *Eastern Cities* (not officially reported, R. 21-23).

February 10th, 1955—Petitioner filed a bond on behalf of barge *LTC No. 38* in the amount of $165,000 reciting the value of the barge as in that sum and that "the petitioner herein, as owner of barge *LTC No. 38*, hereby consents and agrees that, if the claimants herein recover a decree may be entered against it in amount not exceeding the above stated amount" (i. e.) $165,000 (R. 24-26).

March 1st, 1955—Respondent filed her answer and her claim in the amount of $250,000. There were also filed ten other claims, accounting for all possible claimants in the proceeding, of a total of $9,525, so that the sum total of all original claims filed was $259,525 (R. 26, 27, 28, 33).

March 24th, 1955—Respondent moved before Honorable Edward Weinfeld for an order vacating the restraining order as to her state court action claiming that upon the filing of appropriate stipulations, in accordance with *Petition of Texas Co.*, 213 F. 2d 479 (C. A. 2), the restraining should be lifted since the claims of $259,525 were in amount less than the security posted on behalf of the tug and barge, $283,542.21 (R. 30-33).

July 14th, 1955—Judge Weinfeld adopted petitioner's argument that here there were two separate funds, one of $118,542.21 for the tug and another of $165,000 for the barge (R. 43) and accordingly he denied the motion; however, without prejudice to a further application by respondent in the event appropriate stipulations were filed bringing all claims against petitioner as to each vessel within the amount of the bond filed for each vessel. 132 F. Supp. 504 (R. 42-46).

August 10th, 1955—The order was entered upon the

September 23rd, 1955—The ten claimants, other than this respondent, filed stipulations agreeing not to increase the amounts of their claims as made in the total sum of $9,525, nor to enter judgments in excess of their amounts and waiving any claim of *res judicata* with respect to the question of limitation of either of the vessels (R. 47-50).

On the same day this respondent filed a stipulation reducing her claim against petitioner, as owner of the *Eastern Cities* to $100,000, and as owner of the *LTC No. 38* to $150,000. She also agreed not to increase the amount of either of said claims as to the petitioner or either of its vessels, or to enter judgment in excess of the stipulated amounts of her claims against petitioner as owner of either of them, and she waived any claim of *res judicata* with respect to the limitation issues involving either of the vessels (R. 36).

October 4th, 1955—Respondent again moved for a modification of the restraining order of October 8th, 1954 so that she could proceed with her state court suit, basing the motion upon Judge WEINFELD's prior decision and order and the stipulations filed in full compliance therewith (R. 37-41).

December 29th-30th, 1955—Judge WEINFELD rendered his decision, supplemented by a memorandum decision making reference to *Matter of Trinidad Corp.*, decided December 28th, 1955, 229 F. 2d 423 (C. A. 2), and which, he held, supported his disposition of this matter. He granted respondent's motion and, by the memorandum decision, directed that further stipulations and partial releases, suggested in the *Trinidad* case, be submitted by respondent with the proposed order. 137 Fed. Supp. 311 (memorandum decision, R. 51).

January 16th, 1956—Judge WEINFELD signed the order modifying the restraining order of October 8th, 1954 with respect to respondent's state court suit, the respondent having offered her sworn stipulation and partial releases

required by the Court's decision. The order granting the motion was made subject to the following conditions:

> 1. that claimant shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;
>
> 2. that the injunction of October 8th, 1954, insofar as its enjoins collection of the judgment elsewhere that in this proceeding, shall be continued;
>
> 3. that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;
>
> 4. that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;
>
> 5. that the Court further retains jurisdiction of this proceeding against the event that petitioner's right to limit liability of either the tug EASTERN CITIES or barge L. T. C. No. 38 should be questioned in any other forum (R. 52, 53).

Respondent's stipulation and partial releases read as follows:

> "1. She reiterates and affirms the terms of the written stipulation, heretofore executed by her on September 6th, 1955, duly acknowledged before a Notary Public of the State of New York, Dutchess County, and filed herein on September 23rd 1955, providing:
>
> (a) that her claim as against the tug EASTERN CITIES, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of $100,000;
>
> (b) that her claim as against the barge L. T. C. No. 38, the ad interim stipulation for value filed on its behalf, the petitioner and its stipulators for value is reduced to the sum of $150,000;

(c) that she will not increase the amount of either of said claims as against either of the said vessels, as above stated, or the petitioner and its stipulators for value at any future date beyond the amounts so stated;

(d) that she will not enter judgment in any Court in excess of the stipulated amounts of her claims against petitioner as owner of either of said vessels;

(e) that she hereby waives any claim of res judicata relevant to the issue of limited liability with respect to either of said vessels, based on a judgment in any other Court.

2. As her unconditional partial release she represents:

(a) that the total amount of all claims filed herein as against the tug Eastern Cities and the petitioner, as her owner, in $109,525; the total amount of all claims filed herein as against the barge L. T. C. No. 38 and the petitioner, as her owner, is $159,525;

(b) that in consideration of the entry of an order upon this stipulation, pursuant to the decisions of Honorable Edward Weinfeld, United States District Judge, dated December 29th and 30th, 1955, modifying the injunctive order entered herein October 8th, 1954, to permit the prosecution of her suit in Supreme Court, State of New York, Ulster County, she hereby releases and forever discharges the petitioner, its successors and assigns and the tug EASTERN CITIES and the barge L. T. C. No. 38 unconditionally but partially to the extent hereinafter described from all causes of action whatsoever, in law, in admiralty, or in equity which against them she ever had, now has or which her successors hereafter shall or may have by reason of the death of Robert C. Henn on July 10th, 1954, resulting from a collision between the motor yacht BLACKSTONE, on which he was a passenger, with the barge

L. T. C. No. 38 in tow of the tug EASTERN CITIES, in the Hudson River; it being the intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally filed herein in the sum of $250,000 and the reduced amount of her claim heretofore stipulated as against the tug EASTERN CITIES of $100,000, so that the amount hereby released as to such tug and the petitioner is $150,000; and it being the further intent and purpose of this release that it be partial to the extent of the difference between the amount of her claim originally filed herein in the sum of $250,000 and the reduced amount of her claim heretofore stipulated as against the barge L. T. C. No. 38 of $150,000, so that the amount hereby released as to such barge and the petitioner is $100,000.

3. She consents to, and hereby authorizes her proctors Rosen & Rosen, to submit an order to the Court for entry and providing:

(a) that she shall be permitted to prosecute her suit in Supreme Court, State of New York, Ulster County only to judgment;

(b) that the injunction of October 8th, 1954, insofar as it enjoins collection of the judgment elsewhere than in this proceeding, shall be continued;

(c) that the Court expressly reserves jurisdiction to reestablish a concourse and to adjudicate the petitioner's right to a limitation in the event that the funds should ultimately prove to be inadequate;

(d) that in no event shall this claimant recover from the fund an amount in excess of her claim as reduced by the partial releases heretofore given until all other claims have been satisfied in full;

(e) that the Court further retains jurisdiction of this proceeding against the event that peti-

tioner's right to limit liability of either the tug Eastern Cities or barge L. T. C. No. 38 should be questioned in any other forum (R. 54).

April 13, 1956—The Court of Appeals for the Second Circuit affirmed the order of the District Court in an opinion written by Judge FRANK and in which Chief Judge CLARK concurred. Judge HINCKS dissented 232 F. 2d 573 (R. 57). The Court modified the order below by a further limitation upon respondent's measure of recovery (R. 62).

April 27, 1956—A petition for rehearing was filed by the petitioner.

June 7, 1956—Petitioner filed a petition for a hearing *en banc*.

August 21, 1956—The petition for rehearing *en banc* was granted and upon the rehearing the Court adhered to its original decision, without opinion, Chief Judge CLARK and Judges FRANK, LUMBARD and WATERMAN being the majority, and with Judges HINCKS and MEDINA dissenting, also without opinion 235 F. 2d 783 (R. 82).

September 24, 1956—Petitioner filed its petition for certiorari.

November 19, 1956—The petition for certiorari was granted (R. 84).

Summary of Argument

A. The admiralty jurisdiction of the District Court over the limitation proceedings is not challenged, but rather has been conceded by respondent in her answer and by her formal stipulations (R. 29, 54, 36). It has been preserved completely by the District Court's order which modified the restraining order permitting respondent to pursue her common law remedy *only to judgment* in the state court (R. 52, 53).

B. The right to limit is in substance always a plea in confession and avoidance, either partial or total, according to the existence or absence of salvage and freight. For this reason the owner may

plead it as a defense and when he proceeds by petition, he does not change his legal position on the main issues. *Southern Pacific* v. *U. S.*, 72 F. 2d 212, 214 (C. A. 2). The fault of each of the vessels is to be taken for granted on the question of limitation as that is really a defense of confession and avoidance. *Petition of U. S.*, 178 F. 2d 243, 252 (C. A. 2).

C. On a finding of an adequate fund and application having been seasonably made by a claimant to have the injunctive order modified, it is a proper exercise of discretion to grant leave to prosecute a claim outside the concourse. It would constitute an abuse of discretion to deny such an application and thus deprive the claimant of her choice of forum. *Petition of Trinidad Corp.*, 229 F. 2d 423, 428 (C. A. 2). To retain the cause in the District Court would be to preserve the right of the ship owner, but to destroy the right of the suitor in the state court to her common law remedy; to remit the cause to the state court for a limited purpose on the issues of negligence and damage would be to preserve the rights of both parties. In the exercise of a sound discretion, the District Court followed that course, granting respondent's motion to modify the restraining order so as to permit the cause to proceed in the state court, retaining, as a matter of precaution, the petition for limitation of liability to be dealt with in the possible but unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a Court of Admiralty. The failure of the District Judge to do otherwise would have constituted an abuse of discretion subject to the correcting power of the appellate court below and of this Court. *Langnes* v. *Green*, 282 U. S. 531, 541. Because the statute is in derogation of the common law and abridges the rights of a claimant to a full recovery of her damages, it is not to be construed to interfere with the rights of claimant to a greater extent than is necessary to fully and adequately ef-

fectuate the purposes of the Act. *Petition of Southern Steamship Co.*, 132 F. Supp. 316, 319 (D. C. Del.).

D. The adequacy of the funds having been clearly found by the Lower Courts, (1) the statutory privilege of limiting liability is not in the nature of a *forum non conveniens* doctrine, and (2) the statute gives the shipowner sued in the state court no advantage over other kinds of defendants in the same position. Concourse is to be granted only when necessary in order to distribute an inadequate fund. The purpose of limitation proceedings is to provide a marshalling of assets—the distribution pro rata of an *inadequate* fund among claimants none of whom can be paid in full. *Petition of Texas Co.*, 213 F. 2d 479, 482 (C. A. 2) Cert. denied 348 U. S. 829; *Petition of Trinidad Corp.*, 229 F. 2d 423, 427, 428 (C. A. 2); *Curtis Bay Towing Co.* v. *Tug Kevin Moran Inc.*; 159 F. 2d 273, 276 (C. A. 2); *Petition of Moran Transportation Corp.*, 185 F. 2d 386, 388, 389 (C. A. 2); *Petition of Red Star Barge Line, Inc.*, 160 F. 2d 436 (C. A. 2); *The Aquitania*, 14 F. 2d 456, 458, affirmed 20 F. 2d 457 (C. A. 2).

E. Since the petitioner is fully protected in the limitation of liability as to each vessel, there is no sound reason why respondent should not be permitted to proceed with her action in the state court —the forum of her choice—the Court having retained jurisdiction of the limitation proceeding in the event the petitioner's right to limit liability of each vessel should be questioned. *Petition of Lake Tankers Corp.*, 137 F. Supp. 311, 313 (R. 60).

F. The petitioner's argument that it is entitled to a *concursus*, therefore, is specious, without foundation in fact and is plainly designed for the ulterior purpose of defeating respondent's common law remedy. It should receive no countenance in this Court. *Langnes* v. *Green*, 282 U. S. 531, 543.

G. The state court trial of the issues of negligence and damages will present no difficulty as the

do not touch the limitation rights of petitioner or of its interest value in its vessels. Petitioner endeavors by its arguments to "overinflate a relatively simple proposition with apparent, but unreal technical problems". *Maryland Cas. Co.* v. *Cushing*, 347 U. S. 409, 428.

ARGUMENT

I. The adequacy of the funds in the limitation proceeding is amply established.

The discussion of this factual issue is necessitated by the inconsistent contentions made by petitioner both in this Court and below. It has premised its case in the application for the writ of certiorari and again in the opening arguments of its appeal brief on the statement that "the aggregate of the several claims *exceeded* the value of petitioner's interest in its vessels" petitioner's brief, page 10.

Strangely enough it then argues that neither this Court's Admiralty Rules nor the Limitation Statutes require that the claims *exceed* the fund before the Court can take jurisdiction of the proceeding (pp. 10, 11, petitioner's brief). This unusual approach is finally explained by Point III at page 15, for there appears the real cause for the appeal—"*Concursus* is not contingent upon the existence of an inadequate fund". Then under Point IV, for safety's sake, it is stated that the claims *exceed* the fund and that petitioner is entitled to a *concursus* (p. 27). As all this leads to confusion it is deemed necessary to "lay the ghost" as to the adequacy or inadequacy of the fund once and for all.

The District Court found:

> "There are now two separate funds, one for the tug and one for the barge. *Each limitation fund is clearly in excess of the claims asserted as against each vessel.*" Petition of Lake Tankers Corp., 137 F. Supp. 311, 313 (italics ours).

The Court of Appeals found:

> "All of the claims against petitioner as the tug's owner come to $109,525, an amount *less* than the bond of $118,542.21 as to petitioner's liability as owner of that vessel; all of the claims against petitioner as the barge's owner come to $159,525, an amount *less* than the bond of $165,000 as to petitioner's liability as owner of that vessel. *Consequently there was not an insufficient fund in respect of petitioner's liability either as owner of the tug or as owner of the barge.*" Petition of Lake Tankers Corp., 232 F. 2d 573, 577 (italics ours).

The petitioner cannot complain of the treatment of the case by both Lower Courts on a separate fund per vessel basis because the Courts have simply adopted petitioner's own earlier view of the matter. When respondent first moved for a modification of the order restraining her pending State Court action on the ground that the additional bond belatedly posted for the barge in the sum of $165,000 then made a total fund of $283,542.21 against claims of only $259,525, the petitioner strongly opposed that view and argued that there were in fact two separate funds for the two vessels and, therefore, the claims exceeded each fund of $118,542.21 and $165,000 respectively. Nowhere in its brief does petitioner mention this circumstance of argument below. Instead it makes scant reference to the holding of WEINFELD, J. "that there are two funds, each more than the claims against it" (p. 9, petitioner's brief) and complains that the Court of Appeals' finding is "unprecedented" (p. 30).

This was not petitioner's contention on another day when it suited its purpose of defeating the respondent-widow's right to a jury trial in the state forum of her choice, by claiming that there were two funds:

> "The petitioner contends that Petition of Texas Co., *supra*, is inapplicable; that in fact the limitation

> funds do not exceed the aggregate of all claims filed against it. *It urges that in the instant proceeding there is not a single limitation fund of $283,542.21 but on the contrary two separate funds, one for the Eastern Cities in the sum of $118,542.21 and the other for the LTC No. 38 in the amount of $165,000 and that pending a final determination of liability on the part of each vessel, each fund must be treated separately and so treated clearly the eleven claims exceed each fund and so must be brought into concourse.*" Petition of Lake Tankers Corp., 132 F. Supp. 504, 505 (italics ours).

Another misstatement under this subject in petitioner's brief requires examination:

In compliance with the condition of WEINFELD, J.'s order denying the first motion for modification, namely that she could renew her application "in the event appropriate stipulations are filed bringing the total claims * * * within the amounts of the respective interim stipulations * * * on behalf of the tug *Eastern Cities* and the barge *LTC No. 38*", respondent reduced her claims against petitioner as tug owner to $100,000 and as barge owner to $150,000 (R. 35, 36).

Though it happened that the sum total of her reduced claims was $250,000, she nevertheless "reduced" them by the clear language of the stipulation. If she had reduced either claim by $5,000 or $10,000 more petitioner would not have the mathematical weak reed to work with in asserting throughout the litigation that respondent merely "allocated" or "apportioned" her claim and, therefore, the picture had not changed. Neither lower court was swayed by that argument. The District Court wrote:

> "Nonetheless the petitioner contends that the motion to vacate the restraining must again be denied because the amount of the administratrix's claim had not been reduced—'it has only been allocated as between the tug and barge' and the aggregate of the

claims remain as before. I cannot agree. The claimant has in fact reduced her claim as against each vessel." Lake Tankers Corp., 137 F. Supp. 311, 313.

In its statement of the case the Court of Appeals disregarded the tenuous assertion of "allocating" and stated that "appellee filed a stipulation reducing her claim". *Petition of Lake Tankers Corp.*, 232 F. 2d 573, 575 (R. 58).

In its brief in this Court, petitioner still clings to the same erroneous view and repeatedly speaks of the respondent's having "allocated" or "apportioned" her claim. At page 7 it goes so far as to say of WEINFELD, J.: "However, in his opinion the Judge *suggested* that respondent could *escape* the restraining order and the *concursus* of the limitation proceeding if she would *apportion* her claim against the tug and barge and bring the amounts of the claims against each vessel to a sum less than its value" (italics ours). This unfortunate language requires correction in at least two places.

Likewise the elaborate table of claims at page 8 of petitioner's brief is completely contrary to the findings of the Lower Courts and to the truth of the matter. It was used in the briefs below and disregarded and, we submit, it has no place in this argument.*

Drawing support from any direction, the petitioner also stresses the amounts of damages claimed originally in the State Court suits brought by this respondent and four other claimants. The stipulations in the limitation proceedings unequivocally fix the amounts of all claims without regard to the original State Court claims. Each claimant has agreed not to increase the amount of his or her claim as fixed by the stipulations in the limitation proceeding (R. 36, 47-50, 54-56). Therefore, this "straw man" is like the others.

It will be seen that though petitioner in its Summary

* The index of the record is also incorrect in labelling respondent's stipulation as one "allocating" her claim.

of Argument (p. 10) and elsewhere complains of the "maneuverings" of the widow respondent to preserve her common law right to a jury trial in the court where her suit is pending, the petitioner itself has used every possible artifice and argument to defeat her. It was wrong at the outset in failing to file proper security for the barge, as Judge RYAN early held (not officially reported, R. 21), because it knew that it was charged with negligence in the operation of the barge as well as of the tug (R. 19). The restraining order was granted erroneously for that reason (R: 10). It was willing to contend that there was a separate fund thereafter for each vessel—only for the purpose of restraining the State Court proceeding. Having taken that position it about faced in the Court of Appeals and complained of WEINFELD, J.'s holding of two funds as if it had nothing to do with it. It still urges against its original contention and the finding of both Lower Courts. It is still willing to advance the specious argument of "allocation" in spite of the findings below.

It is made perfectly plain that petitioner seeks only to destroy a right to which respondent is clearly entitled,—to try in the forum of her choice the cause for the negligent death of her husband and the father of her three small daughters. The foregoing review proves conclusively that the "maneuverings" have all been on the petitioner's part, and for an ulterior purpose. They should receive no countenance by this Court. *Langnes* v. *Green*, 282 U. S. 531.

II. On a finding of an adequate fund it is a proper exercise of discretion to grant leave to prosecute a claim outside the concourse.

As this Court has recognized, the Southern District of New York and the Court of Appeals for the Second Circuit have been the fountainheads of sound admiralty law principles developing from the great volume of business of

this nature in those Courts. *Bisso, Jr.* v. *Inland Waterways Corp.*, 349 U. S. 85, 99, 100.

Petitioner sharply complains of what it calls a "rule" in this Circuit and which, it says, is opposed to a result which it urges under Point III, namely, that *concursus* is not contingent upon the existence of an inadequate fund. No decision of this or any other Court directly in point is cited but rather bits of dictum are supplied to support a contention which is wholly out of step with conditions in the shipping and insurance industries in the year 1957. Relying on the privilege, accorded by a Statute more than one hundred years old, to *limit* its liability, it asks this Court to disregard the principal object of the Statute and to hold that its primary purpose was to bring all claims into concourse without regard to the limited liability feature. It contends that in *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 490, 417 this determination was made and it also cites *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 357, 359 as supporting its position. These authorities and other cases were urged before the Court of Appeals for the Second Circuit in *Petition of Texas Co.*, 213 F. 2d 478 (C. A. 2) Cert. denied 348 U. S. 829 and in *Petition of Trinidad Corp.*, 229 F. 2d 423 (C. A. 2).

The Court of Appeals, in both of those cases rejected the argument.

In *Petition of Texas Co.* (*supra* 481), the Court wrote:

> "Although the claims as originally filed exceeded the fund (or stipulated value) of $2,109,957.58, they have now been reduced by stipulation so that the fund is about $350,000 in excess of all filed claims. As a consequence, we do not have the problem of a distribution of an insufficient fund contemplated by the staute. For 46 U. S. C. A. § 184 provides that, when loss is suffered by several persons, 'and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation . . .

in proportion to their respective losses', and that the limitation proceedings are 'for the purpose of apportioning the sum * * * among the parties entitled thereto (citing authorities).

We have several times announced the principles which we think must apply here: Absent an insufficient fund (1) the statutory privilege of limiting liability is not in the nature of a forum non conveniens doctrine, and (2) the statute gives a shipowner, sued in several suits (even if in divers places) by divers persons, no advantage over other kinds of defendants in the same position. Concourse is to be granted 'only when * * * necessary in order to distribute an inadequate fund' (citing authorities). The 'purpose of limitation proceedings is not to prevent a multiplicity of suits but, in an equitable fashion, to provide a marshalling of assets—the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full' (citing authorities). We see nothing to the contrary in Maryland Casualty Co. v. Cushing, 347 U. S. 409, 74 S. Ct. 608, where the claims aggregated $600,000 and the Court was advised the valuation was but $25,000."

In *Petition of Trinidad Corp.* (*supra,* 427) the Court made its position even more clear:

"The appellant, in a powerful argument, has asked us to re-examine the *Texas Company* holding. It asserts that in a limitation proceeding involving multiple claims 'the heart of this system is a *concursus* of all claims to ensure the prompt and economical disposition of controversies in which there are often a multitude of claimants,' citing *Maryland Casualty Co.* v. *Cushing,* 347 U. S. 409. It stresses the pertinence of the following passage from the opinion in *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207:

'The proceeding partakes in a way of the features of a bill to enjoin a multiplicity of suits, a bill in the nature of an interpleader, and a

creditor's bill. It looks to a complete and just disposition of a many cornered controversy, and is applicable to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner, the limitation extending to the owner's property as well as to his person."

And appellant further cites *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *The Scotland*, 105 U. S. 24, 33; *Ex parte Slayton*, 105 U. S. 451, 452; and *Just* v. *Chambers*, 312 U. S. 383, 385-6. It suggests that this court in deciding the *Texas Company* case may have overlooked these decisions. But in none of those decisions was there a consideration of the question presently raised, i.e., whether when the fund in court is adequate for payment in full of all the claims, the courts should exercise its jurisdiction to effectuate and maintain a concourse.

It is, of course, true that in limitation cases in which the sum total of the damages as liquidated may exceed the fund available for the payment of claims, the concourse of all claimants in the limitation proceeding is a technique indispensable to the statutory objective, viz., a marshalling of claims. For in such a case, each claimant has an interest not only to enhance his own damages but also to hold t a minimum the damages allowed on competing claims: the greater the damages proved for a competing claim the less will be the proportionate share of the fund actually payable to another claimant under 46 U. S. C. A. 184. In that situation, it is a matter of indifference to the owner how one claimant fares, vis-a-vis another. This feature explains the description, in *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co., supra*, of such a proceeding as 'a many cornered controversy.' In such cases, on the issues of the owner's liability and of its right to a limitation, the claimants have a common interest based largely on the same facts: but on the issue of their respective damages their in-

terests are competing. The concourse is the statutory technique for the determination of these common and competing interests. In such cases, therefore, the concourse will not be disturbed—not even at the instance of the shipowner, as we held in *The Quarrington Court*, 102 F. 2d 916.

However, in cases in which the fund exceeds the total amount of damages which may be awarded, the 'many cornered controversy' does not exist. On the one hand, the owner's right to a limitation becomes moot and, on the other hand, no occasion for a marshalling arises and the concourse is not necessary to protect one claimant from excessive claims by competing claimants. In such cases, this court has held that the limitation statute carries no power to enforce a concourse, thereby depriving claimants of a choice of forum otherwise available. *The Acquitania*, 14 F. 2d 456, aff'd 20 F. 2d 457; *Curtis Bay Towing Co.* v. *Tug Kevin Moran, Inc.*, 159 F. 2d 273; and *Petition of Moran Transportation Corp.*, 185 F. 2d 386. The holding of *Petition of Texas Company* is no more than a logical development of that doctrine: it recognizes that, when application is made to relax a concourse previously granted, the court in the exercise of its discretionary powers must make a preliminary determination of the adequacy of the fund in court to pay in full all claims which may be allowed.

Generally, for purposes of such a determination the maximum damages originally sought on claims still pending will be taken as the measure of an adequate fund: the court will not look into the merits of the claims but will assume that the full damages sought may be awarded. But the *Texas Company Petition* rule recognizes that in the formulation of its discretion the court should give appropriate consideration to releases of claims theretofore filed and to the probability that additional claims may yet be filed. Nevertheless, the same case reaffirms our earlier holding that, in cases in which the fund is found adequate to obviate the need for marshalling, the limitation statute may not be taken

as a grant of power, not otherwise existing in the limitation court, to enjoin a multiplicity of actions. It follows that neither the existence nor the possibility of multiple actions growing out of the maritime disaster which gave rise to the limitation proceeding is relevant to a determination of the adequacy of the fund.

In line with our prior decisions we again hold that, on a finding of an adequate fund made in the light of all relevant factors, on an application seasonably made it is a proper exercise of discretion to grant leave to prosecute a claim outside the concourse and that it would constitute an abuse of discretion to deny such an application and thus deprive the claimant of his choice of forum."

It will be noted from both opinions of the Court of Appeals in *Petition of Texas Co.* and *Petition of Trinidad Corp.* (*supra*) that the numerous decisions cited by petitioner for general law propositions were thoroughly reviewed. The statements under Point I of petitioner's brief that neither the limitation statutes nor the rules require that the claims exceed the fund overlook the fact that the statutes were designed long ago to enable a ship owner to limit his liability to the value of his interest in the vessel. Title 46 U. S. C., Section 183 is sub-headed "Amount of liability" and provides that "the liability * * * shall not exceed * * * the value of the petitioner's interest in the vessel". Section 184 entitled "Apportionment of compensation" provides for the apportioning of the sum to which the owner may be liable among the claimants "whenever * * * the whole value of the vessel, and her freight for the voyage, is *not sufficient* to make compensation to each of them" (italics ours). Accordingly, "they shall receive compensation from the owner of the vessel in proportion to their respective losses".

The admiralty rules merely provide the procedural measures to be taken by an owner "who shall desire to claim the benefit of limitation of liability" (Rule 51). He

is permitted in the proceeding to contest his liability or that of his vessel. Rule 53.

But nowhere in either the statutes or the rules is there any language justifying petitioner's present contention that the *limitation* statute is primarily a *concursus* statute. Thus while petitioner states that neither the statute nor the rules require that the claims exceed the fund, its argument fails because conversely neither the statute nor the rules provide *for a concursus, absent an inadequate fund. Petition of Texas Co.*, 213 F. 2d 478, 481 (C. A. 2).

As the Court of Appeals pointed out in *Petition of Trinidad Corp.*, 229 F. 2d 423, 528 the many-cornered controversy arises only where there is an inadequate fund, requiring the marshalling of claims so that the competing claimants might receive just shares of the fund, the shipowner being indifferent to the result among them if liability and the right of limitation have been determined. The concourse is the statutory technique for dividing the fund. But where the fund exceeds the total amount of damages there is no many-cornered controversy to be settled among the claimants for the concourse is unnecessary to protect one claimant against the excessive claim of another. Therefore, the limitation statute carries no power to enforce a concourse where the fund is adequate, and thereby to deprive a claimant of a choice of forum otherwise available.

This Court is familiar with its decision in *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, upon which petitioner so strongly relies in claiming that a *concursus* is the primary purpose of the limitation statute. As the Court of Appeals pointed out in *Petition of Texas Co.* (*supra*) the claims in that case aggregated $600,000 and the Court was advised that the valuation was but $25,000. While it is true that Mr. Justice FRANKFURTER spoke of the heart of the "system" (i.e. the admiralty rules) as a *concursus* of all claims, that language, we believe, is further explained at page 417 where the Court wrote:

> "They (the admiralty rules) ensure that all claimants, not just a favored few, will come in on an equal footing to obtain a pro rata share of their damages."

At page 418 the Court pointed out that the claims totalled $600,000, the policies in suit only $180,000 and that it could asume that the salvaged ship finally would be valued at $25,000. The whole point of that case was that the Court realized that some claimants in direct action suits under insurance policies would exhaust the insurance fund designed to support the limitation fund, and thereby other claimants would be unjustly deprived of their fair proportionate shares.

Mr. Justice CLARK, in the course of his opinion, said that the Act of 1851 was to encourage American shipping "by placing a limitation upon the personal liability of the ship owner" where there was no privity or knowledge. Mr. Justice BLACK, at page 423 of his dissenting opinion, stated:

> "This Act relieves shipowners from a large part of the liability normally imposed on employers for torts of their employees."

He pointed out that the ship owner could simply turn a fund equal to the value of his interest over to the Court in a limitation proceeding and all claims against him would then have to be satisfied from that fund, no matter how large the claims or how small the fund.

Thus, though petitioner contends so strenuously that *concursus* is the dominating feature of the limitation statute, the very title of the Act and its language as well as that of the rules refutes its argument.

This Court said in *Langnes* v. *Green*, 282 U. S. 531, 541:

> "The term 'discretion' denotes the absence of a hard and fast rule. The Styria, Scopinich Claimant v. Morgan, 185 U. S. 1, 9, 22 S. Ct. 731, 46 L. Ed. 1027.

> When invoked as a guide to judicial action, it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result. In the case now under review, the problem presented to the District Court by the motion of respondent was quite simple. Upon the face of the record, the state court whose jurisdiction already had attached, was competent to afford relief to the petitioner (the claimant in the case). The difference in the effect of adopting one or the other of the two alternatives presented to the District Court was obvious. To retain the cause would be to preserve the right of the shipowner, but to destroy the right of the suitor in the state court to a common law remedy; to remit the cause to the state court would be to preserve the rights of both parties. The mere statement of these diverse results is sufficient to demonstrate the justice of the latter course; and we do not doubt that, in the exercise of a sound discretion, the District Court, following that course, should have granted respondent's motion to dissolve the restraining order so as to permit the cause to proceed in the state court, retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the possible but (since it must be assumed that respondent's motion was not an idle gesture but was made with full appreciation of the state court's entire lack of admiralty jurisdiction) the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty. The failure to do this, in our opinion, constituted an abuse of discretion subject to the correcting power of the appellate court below and of this court."

Petitioner seeks to distinguish between a single claim case and one where, though there is an adequate fund, there are several claims. We submit that the Court of Appeals

correctly held in *Petition of Texas Co., Petition of Trinidad Corp.* and in this case that there is no peculiar reason for the admiralty court to have unlimited jurisdiction, the fund being adequate, to the prejudice of a claimant. There is the basic principle, as this Court recognized in *Langnes* v. *Green* (*supra,* 543) that the act which gives the Court its admiralty and maritime jurisdiction saves to suitors in all cases the right of the common law remedy where the common law is competent to give it, and good faith requires that this proviso shall have its full and fair effect.

Petitioner states, in reciting the early history of limitation proceedings that the statute should not be grudgingly construed against it. However, there is the equally forceful principle, wholly in line with this Court's holding in *Langnes* v. *Green,* that since the statute is in derogation of the common law and abridges the rights of a claimant to a full recovery of her damages, it is not to be construed to interfere with the rights of the claimant to a greater extent than is necessary to fully and adequately effectuate the purpose of the act. *Petition of Southern Steamship Company,* 132 F. Supp. 316, 319 (D. C. Del.).

Here, after having had the matter twice before him and with complete knowledge of all the circumstances, WEINFIELD, J. exercised his sound discretion and in a careful opinion concluded:

> "Since petitioner as shipowner is fully protected in the limitation of liability as to each vessel, there is no sound reason why claimant should not be permitted to proceed with her action in the State Court—the forum of her choice. Finally, the Court retains jurisdiction of the limitation proceeding in the event the petitioner's right to limit liability of each vessel should be questioned." Petition of Lake Tankers Corp., 137 F. Supp. 311, 313.

Summarizing, the respondent has not challenged but readily concedes the right of the ship owner to invoke the

limitation statute by the filing of its petition. It does not question those authorities in which, because the restraining order was not attacked, the admiralty courts have made a complete disposition of causes with varying results both to the ship owner and to claimants in those proceedings. But respondent insists that her common law right to a jury trial in the forum of her choice must receive the equal protection of the law as the right of the ship owner to limit his liability to the value of his interest in the vessel or vessels. Respondent strenuously opposes the argument that *concursus* is the primary object of the *limitation* statute. Dictum from after-trial decisions, cited by the petitioner, are not persuasive in the consideration of this primary, important question whether respondent's right to the common law remedy, where there is an adequate fund, may be taken away from her by the argument that the shipping industry in 1957 deserves better treatment than the railroads, airlines and other transportation concerns. Petitioner seeks to turn back the clock to that early day when American shipping needed encouragement, but it cannot be overlooked, as the Court of Appeals pointed out in *Petition of Texas Co.*, 213 F. 2d 479, 482 that absent an insufficient fund, the limitation statute gives a ship owner no advantage over other kinds of defendants, sued in several suits and by divers persons in divers places.

In *Maryland Cas Co.* v. *Cushing*, 347 U. S. 409, Mr. Justice BLACK in a dissenting opinion in which Chief Justice WARREN, Mr. Justice DOUGLAS and Mr. Justice MINTON concurred, wrote at page 437:

> "Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons."

We respectfully submit that this is no time for judicial expansion to the extent here claimed by petitioner,—that in the case of an adequate fund, it is entitled to a *concursus* of all claims though, as stated, the land and air transportation industries do not have that advantage.

At page 31 of its brief the petitioner states that it had an option to begin a single, or two proceedings and that it exercised that option and began one. It fails to mention its attempt to "get away" with filing one bond for only the tug. It further says, "That was the exercise of a clear right under the statute and the rules and such advantages as it may gain from the exercise of its right cannot justly be taken away."

Are there then *advantages* to be preserved *justly* to a petitioner to the detriment of a widow and three young children of a man who, it is charged, was lost to them by wrongful acts of the petitioner? Is this a sport of legal tricks by which the respondent's common law remedy may be wiped out at the sole "option" of the petitioner?

If petitioner succeeds in such argument the Court must hold that in any case where the limitation petition names two or more vessels, whose personnel are separately charged with fault, no relief whatever can be afforded to save to claimants-suitors their common law remedy. The Court would have to hold that it is powerless to lift the restraint though claims are separately asserted against separate adequate funds, and that the "option" or power lies solely with the petitioner by the manner in which it invokes the limitation statutes, either by one or two proceedings. That course would be wholly opposed to this Court's holding in *Langnes* v. *Green* (*supra*), from which we have quoted at some length at page 23 of this brief.

As to the "advantages" which petitioner seeks to gain, the Court of Appeals said, "The owner cannot enlarge its rights under the statute by the mere expedient of coupling

the two proceedings". *Petition of Lake Tankers Corp.*, 232 F. 2d 573, 577.

There is no question that petitioner could have filed a separate limitation proceeding for the barge after Judge RYAN's holding that a bond had to be posted for that vessel. In such event respondent would have filed a claim in that proceeding for $150,000 and another claim in the tug limitation proceeding for $100,000. Each fund would have been adequate and she, long ago, would have gotten permission to try her common law action.

It was petitioner who wrongly shaped the proceedings from the beginning by filing a bond only for the tug and, ever since, it has used all possible means to frustrate respondent in her legal remedy in the common law court, where her suit lies dormant against the time when the last efforts of petitioner will have been expended. We submit that the long hard fight which she has made against a formidable opponent deserves a prompt and decisive disposition in her favor.

III. The prosecution of respondent's state court action would not violate the admiralty jurisdiction of limitation but would determine only issues of negligence and damage, subject always to petitioner's limitation right in admiralty.

As a final maneuver against respondent, petitioner seeks to "overinflate a relatively simple proposition with apparent, but unreal, technical problems". *Maryland Cas. Co. v. Cushing*, 347 U. S. 409, 428.

It asserts that by some manner the state court will interfere with the *in rem* liability of the vessels, a subject concededly within the jurisdiction of the admiralty court. In this effort respondent states, at page 34 of its brief, that "The District Court thought that the Ulster County Jury could 'spell out the precise liability that may be imposed

with respect to each vessel' ". This is an erroneous presentation of the District Court's opinion. Within a few lines either side of the quoted portion there is clear language proving that the court had reference not to "each vessel" but to the *negligent operation* of each by its personnel. The Court said:

> "She will be entitled to the aggregate of her separate and reduced claims only if she succeeds in fastening liability by reason of the *negligent operation* of both the tug and the barge."

In speaking of the employment of a special verdict in the state court, upon appropriate application, the Court said:

> "Thus in the event, under a special verdict, there is a finding of *negligence in the operation* of the tug and not of the barge, the moving claimant's recovery, under her stipulation could not exceed the amount of her reduced claim."

Further on the Court said:

> "and alternatively if liability were established solely because of the *negligent operation* of the barge, no recourse could be had as against the bond posted by the tug" (137 F. Supp. 311, 312, 313).

It is clear, therefore, that it was never the District Court's intention to say that it would be within the province of the state court jury to determine the *in rem* liability of either vessel.

Petitioner had earlier cited cases in its brief, in aid of this *in rem* liability feature (pp. 5, 28), where a vessel without motive power in tow of a tug was exonerated from fault *in rem* because there was no active negligence on its part. This is sound law, as originally enunciated by this court in *Liverpool, etc. Nav. Co.* v. *Brooklyn Eastern District Terminal*, 251 U.S. 48, the principle being that since

the "dumb" vessel was not an instrumentality involved in the wrong it was not required to be surrendered in limitation proceedings. Here, however, the failure of proper lighting on the barge is a fault directly chargeable to her personnel, as well as to those on the tug. *Asfalto,* 45 F. 2d 857, 859 (D. C. S. D. N. Y.). In the first decision written in this matter, Judge RYAN said:

> "The collision here occurred at night. Movant claims that a contributing cause was improper lighting of the barge. The petition alleges that both vessels were exhibiting regulation navigation lights. A factual issue has been presented for trial. If the barge was not equipped with proper lights, as movant asserts, it cannot now be said that she was not an offending vessel merely because she was without motive power and under the control of the tug." *The Asfalto,* 45 F. 2d 857 (R. 22, not officially reported).

Respondent does not contest the *in rem* liability of petitioner's vessels by her state court proceeding. She readily agrees with the law propositions, at page 33 of its brief, that the admiralty court has exclusive jurisdiction of all questions affecting limitation and that the amount of the fund is exclusively for the admiralty court to administer.

We submit that the petitioner's suppositious problems with respect to the mechanics of handling this simple litigation unduly exaggerate the picture, especially since at this early stage we know that the fault of those in charge of each vessel, for the moment, is to be taken for granted on the question of limitation as that is really a defense of confession and avoidance. *Southern Pacific Co.* v. *U. S.,* 72 F. 2d 212, 214 (C. A. 2); *Petition of U. S.,* 178 F. 2d 243, 252 (C. A. 2).

There is no doubt that eventually petitioner may be held only for negligence of those in charge of one of its vessels and that the value of that particular vessel need

only be surrendered ultimately in admiralty when the appropriate limited judgment shall have been obtained by respondent, though not collected, in the state court. This would be the case even though the cause were tried in admiralty. However, neither this court nor the courts below are now called upon to fathom future questions of ultimate liability, either with respect to the navigation of the tug or the alleged improper lighting of the barge. Whether petitioner is in fact liable for the negligence of those in charge of either of its vessels, or both of them, and the quantum of such liability all are questions not yet ripe for consideration or until there is a trial in the state court and further proceedings on the petition to limit.

As pointed out by WEINFELD, J. a special verdict may be applied for which would spell out the precise liability with respect to each vessel and it is not to be presumed that the state court will deny an appropriate application for a special verdict. 137 F. Supp. 311, 313 (New York Civil Practice Act, Secs. 458, 459). Those sections make clear provision for instructions to the jury for a special verdict by questions and findings in writing, and which must be filed with the clerk and entered in the minutes, upon which the judgment is issued. The New York official reporters are replete with cases where those sections have been employed successfully and, in fact, the Appellate Courts have encouraged the practice for the very purpose of avoiding difficulty and lightening their work.

This case is a prime example of one where the special verdict would be of particular value and therefore, with all due respect to Judge HINCKS, who dissented from the majority opinion in the Court of Appeals, we cannot agree with his view that "It is by no means unlikely that the Judge would refuse a request to require special findings".

The special verdict would entail but three questions which may be briefly stated: (1) Was defendant's personnel

in charge of its tug negligent to plaintiff's damage? (2) Was defendant's personnel in charge of its barge negligent to plaintiff's damage? (3) The amount of damages sustained by plaintiff. The mechanics for the collection of her reduced claims thereafter would rest solely within the province of the admiralty court in the limitation proceeding.

The "safeguards" already provided for, in accordance with *Petition of Trinidad Corp.* and *Petition of Texas Co.* (*supra*), were further strengthened in petitioner's favor by the Court of Appeals in this case. In affirming the decision below it imposed the additional conditions that a permanent injunction will issue enjoining respondent from collecting the excess of $100,000 unless the judgment rests on a special verdict allocating the amount as between petitioner, as owner of the tug and the barge. If the judgment exceeds $100,000 and the jury finds petitioner liable solely as tug owner, she is enjoined from collecting any such excess, and if liable solely as barge owner, she is enjoined from collecting any amount in excess of $150,000 (*Petition of Lake Tankers Corp.*, 232 F. 2d 573, 577).

It will also be remembered that she is bound completely by her stipulations and partial releases, as well as by the previous court order to do no more than to proceed to judgment in the state court. She may not collect that judgment elsewhere than in the limitation proceeding and the court expressly reserves jurisdiction to reestablish a concourse and adjudicate petitioner's right of limitation in the event the funds should prove to be inadequate or the petitioner's right to limit is questioned in the state forum (R. 5-9, 62).

The three situations, posed as additional obstacles by petitioner at pages 35 and 36 of its brief may be readily answered. Certainly neither the respondent nor her counsel would dare to execute on the state court judgment

against petitioner's bank accounts since they are now clearly enjoined by court order, issued on formal sworn stipulations. Further, in no event could petitioner be called upon to pay respondent $118,000 if the tug personnel are found negligent since she has reduced her claim to $100,000 against petitioner as tug owner. Finally, the suggestion that the admiralty court might some day enter a decree of exoneration with a perpetual injunction against all claims, including respondent's, is too far fetched for serious discussion. The District Court undoubtedly would take cognizance of its own orders previously entered and would, at the proper time, issue a final decree dispositive of respondent's claim and all others.

Since the funds are adequate, justifying the modification of the restraining order, and petitioner does not have an advantage over other kinds of defendants sued in several suits in divers places by divers persons, why should it be in a different position than a railroad or airline confronted with negligence suits of injured persons in several forums? In such litigations the results might well be different both as to liability and damages. As *concursus* is not the petitioner's right under the circumstances of this case, the results with respect to liability in the state court or the admiralty court merely parallel those which other transportation industries must face, except that they do not enjoy the valuable privilege of limiting their liability. There is no question of the decisions in the state court being *res judicata* here. *Petition of Lake Tankers Corp.*, 232 F. 2d 573, 577.

Accordingly, it is submitted that respondent's right to a jury trial in the forum of her choice is of paramount importance and should be effectuated since all "safeguards" possible have been afforded petitioner in its right of limitation.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be affirmed.

Dated New York, N. Y., April 26th, 1957.

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